COA Case No. 49580-5-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

BRIANNA P. CHANDLER, as personal representative for estate of KAHIL M. MARSHALL;

Plaintiff/Appellant,

vs.

THE STATE OF WASHINGTON; DEPARTMENT OF TRANSPORTATION; SHELTON SCHOOL DISTRICT #309 a municipal corporation; SUZAN J. MONTANO-FELTON and JOHN DOE MONTANO-FELTON, husband and wife and the marital community comprised thereof; NATHEN R. WRIGHT and JANE DOE WRIGHT, husband and wife and the marital community comprised thereof et. al.;

Defendants/Respondents,

RESPONDENTS SHELTON SCHOOL DISTRICT AND SUZAN J. MONTANO-FELTON'S ANSWERING BRIEF

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I. INTRODUCTION

Respondents/Defendants Shelton School District and Suzan Montano-Felton were found by a jury to have not been responsible for the death of Kahil Marshal. The verdict found the District to have been negligent but that their negligence was not the proximate cause of the accident. Appellant's appeal of that verdict is completely baseless.

II. ASSIGNMENTS OF ERROR

A. The jury's finding that the District was negligent but that the negligence was not the proximate cause of the accident is completely consistent with caselaw, jury instructions and the evidence.

B. The special verdict form was agreed to and proper.

C. The jury was under no obligation to award damages to appellant, especially when they found the party to not be liable.

D. The court correctly refused to set aside the verdict, enter judgement notwithstanding the verdict or grant a new trial.

III. STATEMENT OF THE CASE

On October 27th, 2010 Appellant/Plaintiff Kahil Marshall was killed when a vehicle she was a passenger in collided with the back of a school bus. (CP 2) On that date, at approximately 6:00am – 6:30 am, Steven Cole was driving from his home in Dayton, Washington, to his

work in Olympia, Washington. (RP 510-512) He worked as a traffic technician for the City and drove the same route for over fifteen years. (RP 511) It was just getting light and ninety percent of the vehicles on the road had their lights on. (RP 512) He saw a school bus that morning as he often does, (*Id.*) He first noticed the bus just after it made its change into the left lane of the highway, something he notices often, "like clockwork." (RP 513-515) About this time he also noticed a car driving erratically behind him and it appeared to be drifting between lanes, and when it passed him he was forced onto the shoulder of the highway. (RP 515) He noticed another car have to take evasive action as well. (RP 516) He watched the car go down the road and run into the back of a school bus. (*Id.*) The bus had its blinker on and getting ready to make a left turn (RP 537) He did not see any break lights, and he was anticipating that the car would go around the bus, that had many lights on, but it just ran into the back of the bus. (RP 517) He did not see the bus suddenly change lanes and there was nothing obscuring his view. (*Id.*) He immediately pulled over and called 911. (RP 518) He is a certified flagger and he began directing traffic. (*Id.*)

On that same morning, Respondent/Defendant Suzan Montano-Felton was driving her bus on a route she has travelled for fifteen years. (RP 324) She made a lane change into the left lane at the same place on

the highway that she has for many years, well before the accident scene. (RP 325-326) At the accident scene there is a gusset, a place between the south and northbound highway, where she slows to make a turn off the highway onto Hurley Waldrip Road. (*Id.*) As she was slowing, her bus was slammed into from behind. She was not on the phone at the time of the accident. (RP 327)

Detective Sergeant Stacy Moate interviewed Nathen Wright, the driver of car that collided with the bus, concerning the accident while he was at Harborview hospital. (RP 454 – 459) Mr. Wright indicated that he was driving Kahil to the hospital for an operation, going around sixty-five miles per hour when he looked down. (RP 458) When he looked back up he was right behind a bus and he smashed into it. (*Id.*) He added that he did not hit his brakes, it was instant. (*Id.*) When asked if he had observed the bus prior to the accident, he said "no, he hadn't seen it at all."(*Id.*) At trial, Mr. Wright testified that as he went around a corner that comes up to Hurley Waldrip Road he saw a school bus but he wasn't thinking anything of it because it was in the right lane. (RP 29) He then looked down for "no more than three seconds" and when he looked up the bus had changed lanes and he immediately hit it. (RP 29-30) Mr. Wright spent five years in prison for vehicular homicide. (RP 31)

IV. ARGUMENT

A. The jury's finding that the District was negligent but that the negligence was not the proximate cause of the accident is completely consistent with caselaw, jury instructions and the evidence.

In order to prove actionable negligence, a plaintiff must establish the existence of a duty, a breach thereof, a resulting injury, and proximate causation between the breach and the resulting injury. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). It is well known and accepted that all four elements have to be proved in a negligence action. The applicable standard jury instruction also makes it clear that "proximate cause" is a separate element that needs to be found. *WPI 21.02*

As is evident in the appellant's brief, a great deal of time at trial was spent trying to show that Ms. Montano-Felton was a poor bus driver and employee. The jury seems to have believed that. However, there was no evidence offered that showed any of the prior accidents, lack of documentation or other alleged shortcomings of the bus driver *caused* the accident. Hence, the jury's finding that the District was negligent for keeping her as a driver but not responsible for the accident makes sense. For instance, a great deal of time was spent on Ms. Montano-Felton's cell phone usage, including going over her phone statements and how she often made calls while on duty. However, those same records show she

was not on the phone at the time of the accident. An eyewitness, the only eyewitness, described the accident, and the car driver clearly changed his story in trial, after saying he never saw the bus prior to the accident. The jury believed the eye witness and the driver's original statement.

Furthermore, Washington law is clear that the "following vehicle" in a rear end collision is the at fault party**.** Where two cars are traveling in the same direction, the primary duty of avoiding a collision rests with the following driver. In the absence of an emergency or unusual conditions, he is negligent if he runs into the car ahead. *Riojas v. Grant Cnty. Pub. Util. Dist.*, 117 Wn.App. 694, 698, 72 P.3d 1093, 1095-96 (2003) citing *Tackett v. Millburn*, 36 Wn.2d 349, 218 P.2d 298 (1950).

> *The following driver is not necessarily excused even in the event of an emergency, for it is his duty to keep such distance from the car ahead and maintain such observation of that car that an emergency stop may be safely made.*

Riojas v. Grant Cnty. Pub. Util. Dist., 117 Wn.App at 698 citing *Ritter v. Johnson*, 163 Wn. 153, 300 P. 518, 79 A.L.R. 1270 (1931); *Larpenteur v. Eldridge Motors Inc.*, 185 Wn. 530, 55 P.2d 1064 (1936); *Cronin v. Shell Oil Co.*, 8 Wn.2d 404, 112 P.2d 824 (1941).

Jury Instruction 16 made this clear. (RP 568)

B. <u>The special verdict form was agreed to and proper</u>.

Appellant argues that the verdict form was prejudicial, apparently because the jurors wouldn't have known they could find the school district or Ms. Montano-Felton liable. Prior to instructing the jury, the judge said to counsel,

> **We have instructions that the parties worked on with the Court. I provided each of you a copy of the Court's instructions. Have you had an opportunity to review those instructions?**
>
> ***Yes, your Honor*** **(Both counsel's response)**
>
> **Okay, Do we have any changes needed to be made, comments, arguments, exceptions to any of the instructions?**
>
> ***Not from the Plaintiff*****. (Appellant/Plaintiff's response)**
>
> (RP 559)

The instructions, including the verdict form, were agreed to by counsel. Furthermore, the logic of this argument ignores that the jurors heard closing arguments - They were urged by Plaintiff's counsel to find liability against the District and the bus driver, instructed they could find such liability by the Court and that they *should* by counsel, and shown how to fill out the form by the court and counsel. It is unclear how they

could have been confused about whether they could find liability against the district and the bus driver.

CR 51(f) requires a party objecting to a jury instruction to "state distinctly the matter to which he objects and the grounds of his objection." This objection allows the trial court to remedy error before instructing the jury, avoiding the need for a retrial. *Egede-Nissen v. Crystal Mt., Inc.*, 93 Wn.2d 127, 134, 606 P.2d 1214 (1980). "The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection." *Crossen v. Skagit County*, 100 Wn.2d 355, 358, 669 P.2d 1244 (1983). In the case at bar, no objection or exception was made to the proposed verdict form. "So long as the trial court understands the reasons a party objects to a jury instruction, the party preserves its objection for review." *Washburn v, City of Federal Way*, 178, Wn.2d 732, 747, 310 P.3d 1275 (2013).

This objection was not preserved, and was clearly not prejudicial.

C. <u>The jury was under no obligation to award damages to appellant, especially when they found the Respondents to not be liable</u>.

This argument ignores the fact that the jury found the District and bus driver, Ms. Montano-Felton, not liable for any damages. Appellant seems to be suggesting that because the car driver, Mr. Wright, was found

liable by default, there should be joint and several liability. That might be true if liability had been found against the District and bus driver, but it wasn't.

If appellant is suggesting that the jury should have been required to find an amount of damages to be assessed against Mr. Wright, since he had been found to be liable, then that should have been requested at the time by counsel for Appellant/Plaintiff. Perhaps, counsel elected to not pursue damages against Mr. Wright.

D. The Court was under no obligation to set aside the verdict or enter judgement notwithstanding the verdict, as no such motion was made; further, the motion for a new trial was properly denied.

The record does not reflect a motion for judgment notwithstanding the verdict or to set aside the verdict. There was a motion for a new trial that was denied. (CP 90)

Appellant/Plaintiff pointed to CR 59, sub parts 1, 2, 7 and 9 as the basis for the motion. Plaintiff's argument ignores the fact that an eye witness to the accident testified that he saw Mr. Wright's car drive into the back of the bus, and that the bus did not suddenly change lanes. Further, they ignore evidence that Mr. Wright changed his story to say the bus suddenly changed lanes. Whether Plaintiff believes that evidence or not,

the jury apparently did. Under *CR 59 (a)(7)*, the court views 'the evidence in the record in the light most favorable to the nonmoving party to determine whether, as a matter of law, there is no substantial evidence or reasonable inferences to sustain the verdict for the nonmoving party.' *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992). There is clearly evidence to substantiate the verdict.

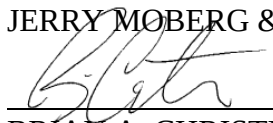
A new trial on the grounds of lack of substantial justice under CR 59(a)(9) is rarely granted, given the other broad grounds available under the rule. *Lian v. Stalick*, 106 Wn.App. 811, 825, 25 P.3d 467 (2001). There is clear evidence to substantiate the verdict and no evidence that substantial justice has not been done.

V. **CONCLUSION**

This appeal is groundless and should be denied. Eyewitness testimony provides a basis for the verdict and there is no evidence of prejudice, misuse of judicial discretion or anything else that would allow the verdict to be overturned.

RESPECTFULLY SUBMITTED this 10th day of October, 2017.

JERRY MOBERG & ASSOCIATES, P.S.



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CERTIFICATE OF SERVICE

I certify that on this date I electronically filed the document to which this is affixed and an electronic copy of the document will be sent to:

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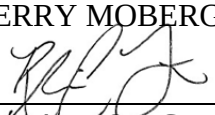
DATED October 10, 2017 at Ephrata, Washington.

JERRY MOBERG & ASSOCIATES, P.S.



RHIANNON C. FRONSMAN, PARALEGAL

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